

APPEAL NO. 022230  
OCTOBER 21, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on August 5, 2002, the hearing officer determined that the issue of whether the respondent (carrier) waived its right to contest the compensability of the claimed injury by not contesting compensability within sixty days of the date it received notice of the injury was improvidently certified and not in dispute; that the carrier failed to contest compensability or initiate benefits within seven days of receiving written notice of the injury; that the appellant (claimant) did not sustain a compensable injury on \_\_\_\_\_; that the carrier is relieved of liability for the claimed injury, pursuant to Section 409.002, because of the claimant's failure to timely notify the employer of the injury, pursuant to Section 409.001; and that the claimant had no disability resulting from the injury sustained on \_\_\_\_\_. The claimant challenges the injury, notice, and disability determinations contending, principally, that the application of the Texas Supreme Court's decision in Continental Casualty Co. v. Downs, No. 00-1309, decided June 6, 2002, which became final on August 30, 2002, should result in a determination that the carrier has waived its right to dispute the compensability of the claimed injury. The carrier's response urges the sufficiency of the evidence to support the challenged determinations. The carrier further contends that the Downs decision should not be applied retroactively and that the timely notice of injury issue is not an issue of compensability but rather of carrier liability, and, thus, that such issue is not subject to waiver under Downs.

DECISION

Reversed and a new decision rendered.

The parties stipulated that the issue concerning whether the carrier waived its right to contest compensability by failing to dispute the claim within 60 days of its first notification was improvidently certified and not in dispute; and that the carrier received written notice of the claim on or before September 6, 2001, and filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) contesting compensability on October 24, 2001. Not appealed is a finding of fact that the carrier did not initiate benefits or contest compensability of the claimed injury within the seven day period immediately following the date it received written notice of the claim, a finding that the carrier had paid no benefits on this claim, and a legal conclusion that the carrier failed to contest compensability or initiate benefits within seven days of receiving written notice. These findings and the conclusion, not having been appealed, have become final. Section 410.169.

The claimant testified that on \_\_\_\_\_, while working as a concrete finisher on a crew supervised by Mr. B, he attempted to remove a manhole cover with a pickaxe and slipped, injuring his right elbow and right knee; that he reported the injury

that day to Mr. B and continued to work in pain; that when Mr. B took no action on his report, he reported his injury again to another supervisor; that he continued to work at lighter duties until August 29, 2001, when he was taken off work by his chiropractor because he could not work due to the pain from his injuries; that he was incarcerated for six weeks from some date in late November 2001 to some date in December 2001; and that he remained off work until June 2002 when he commenced lighter work as a house painter. The employer's contract administrator, Mr. M, who said his duties include the investigation of workers' compensation claims for the employer, testified that the employee time sheets reflect that during the week of \_\_\_\_\_, the claimant did not work at the site to which he testified and under the supervision of Mr. B, but worked at another site and under the supervision of another supervisor. The claimant's medical records do reflect that he had medical problems with his right elbow and knee.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.169(a) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). We are satisfied that the challenged factual determinations relating to the injury, timely notice of injury, and disability issues are sufficiently supported by the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). However, notwithstanding that these factual determinations are sufficiently supported by the evidence and would otherwise support the challenged legal conclusions, the carrier cannot prevail on the injury issue because it failed to "pay or dispute" within seven days of receiving written notice of the claimed injury. The hearing officer made findings that the Downs decision was not yet final and that the Texas Workers' Compensation Commission (Commission) had issued TWCC Advisory 2002-08 (June 17, 2002) directing Commission employees to await a final order from the Texas Supreme Court before applying the holding in Downs. However, as the Appeals Panel has since stated in Texas Workers' Compensation Commission Appeal No. 022027-s, decided September 30, 2002, the Texas Supreme Court denied the motion for rehearing on August 30, 2002, and "the Downs decision, along with the requirement to adhere to the seven-day 'pay or dispute' provision is final. Texas Workers' Compensation Commission Appeal No. 021944, decided September 11, 2002; see also TWCC Advisory 2002-15 (September 12, 2002)."

Accordingly, we reverse the hearing officer's decision and order and render a new decision that the carrier has waived its right to contest the compensability of the claimant's injury.

The true corporate name of the insurance carrier is **NORTHERN INSURANCE COMPANY OF NEW YORK** and the name and address of its registered agent for service of process is

**GARY SUDOL  
9330 LBJ EXPRESSWAY, SUITE 1200  
DALLAS, TEXAS 75243.**

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Robert W. Potts  
Appeals Judge